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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. AARON AXEL DEASON, Defendant and Appellant.	F074755 (Super. Ct. No. F14907847) **OPINION**

APPEAL from a judgment of the Superior Court of Fresno County. Wayne R. Ellison and Jonathan M. Skiles, Judges.

A. M. Weisman, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Darren K. Indermill, Deputy Attorneys General, for Plaintiff and Respondent.

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Aaron Axel Deason (defendant) stands convicted, following a jury trial, of committing a lewd or lascivious act on more than one child under 14 years of age (Pen.

Code, §§ 288, subd. (a), 667.61, subd. (e)(4); counts 1 & 8), oral copulation of a child 10 years of age or younger (*id*., § 288.7, subd. (b); count 2), and using a minor to perform sex acts (*id.*, § 311.4, subd. (c); counts 3–7). He was sentenced to a total unstayed term of five years eight months plus 50 years to life in prison and ordered to pay various fees, fines, and assessments. On appeal, he contends: (1) denial of his request to represent himself requires automatic reversal; (2) the trial court erred by excluding evidence that would have impeached one of the complaining witnesses; (3) the trial court erred by admitting evidence of child pornography found on defendant's laptop computer; (4) the trial court erred by admitting statements made during a forensic interview; (5) CALCRIM No. 1190 improperly reduced the burden of proof; and (6) cumulative prejudice requires reversal. We find no reversible error and affirm.

FACTS

In August 2014, defendant and his wife, T., traveled from Washington to California to attend a funeral in Fresno County.[1] For much of the time, they stayed at the home of T.'s cousin Y. and her husband J. The house had a swimming pool. Y. and J.'s children included daughters K., who was four years old at the time, and S., who was seven years old.

C.T., T.'s sister-in-law, was also staying at the house because of the funeral. On the afternoon of August 18, C.T. found K. lying on top of a bed in one of the children's rooms. K. was naked, and defendant was trying to put her underwear on her. When C.T. told K. she would help her get dressed, defendant got up and said yes, K. should let C.T. help. He then left the room. C.T. asked K. if defendant touched her. K. said no.

On the night of August 18, T. and defendant went to bed at about 10:00 p.m. T. awoke at 12:30 a.m. to discover defendant was not in bed with her. Feeling like

[1]Unspecified dates in the statement of facts are from the year 2014.

For purposes of privacy, we refer to certain people by first name or initial only. No disrespect is intended.

something was wrong, she went to make sure the girls were all right. Three of the girls were sleeping, but K. was missing.

T. noticed the bathroom light was on and heard water dripping. When she opened the door, K., who was wearing a nightgown, was whispering into the shower. T. opened the shower curtain to find defendant standing inside, fully clothed. The floor of the shower was wet, but the water was not on and his clothes were dry.

T. took K. a short distance away from defendant, and asked her what was going on. When K. responded that it was a secret, T. said she was defendant's wife, so she got to know all of his secrets. K. then said defendant had "licked her bum." Defendant took T. outside and told her something that caused her to fall to the ground in shock. T. sent defendant to Washington to see his counselor, and he left the house.

T. told her brother, who telephoned their father, Wayne, and asked him to come to the house. They then told J. and called the police.

Police Detective Christopher Peters asked Wayne to call defendant. During the call (a recording of which was played for the jury), Wayne asked whether something happened between defendant and K. or if what was being said was "just full of hot air[.]" Defendant responded, "It's not full of hot air," and he replied affirmatively when Wayne asked if there was truth to what was being said. Defendant said he did not hurt K. He did not want to say exactly what he did, but he told Wayne, "I was bad." Defendant said he was in Las Vegas, and was going to stay with a friend in Salt Lake City for a while. He said he never meant to hurt anyone, but he "just lost control." He denied touching any of the other children in the family. When Wayne said they were not going to hurt him, defendant responded that he would not blame them if they did, because he deserved it. Wayne suggested that if the police did get involved, it would look better if defendant turned himself in. Defendant said he was fine with turning himself in, but would rather die than go to prison. He would not blame the family for calling the police.

Defendant was located in Clovis on the evening of August 19 in his car and was placed under arrest. Police Sergeant Kory Westbury seized a cell phone that was sitting on the driver's seat, connected to a charging cord. The phone had directions to the police department. Westbury also seized a laptop that was sitting on the passenger seat of the vehicle.

Subsequent analysis revealed more than 1,400 images of child sexual abuse on the laptop. Defendant was in three or four of the images found on the laptop, although not those involving child sexual abuse or child erotica.[2] The children, who were six to 10 years old, were engaged in sexual activity (most often oral copulation and sodomy) with adult males. The file creation dates for the images ranged from March 18 to August 4. A majority of the images had been deleted, with 822 having been deleted at 4:25 a.m. on August 19. The laptop also contained over 20,000 images containing child erotica, with the children ranging between six and 12 years old. Most of these images were deleted on the evening of August 8, but three were deleted at 4:24 a.m. on August 19. In addition, the laptop contained 50 videos of children between the ages of two and 10 engaging in sexual activity (most often intercourse, oral copulation, or sodomy) with adult males. One of the videos was deleted at 4:25 a.m. on August 19.

Later that same day, T. was allowed to talk to defendant in the interview room at the police department.[3] During the conversation, defendant admitted he had taken a picture of S. in her underwear.

Also on August 19, Caroline Dower conducted a forensic interview with K. at the Family Healing Center.[4] K. initially denied anyone had touched her bottom. She said

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[2]Lieutenant Curt Fleming, who performed the analysis, explained that child erotica refers to pictures of underage children posing unclothed or partially clothed. Although the poses are sexual in nature, the children's pubic areas are not exposed. In child sexual abuse images, the children are posed in sexual positions and their pubic areas are exposed.

[3]A video recording of their conversation was played for the jury.

that if someone touched there, it would be a secret. She did not know anyone named Aaron or Axel. Later, K. said she knew a girl who told K. that the girl could know all of his secrets. K. did not remember what secrets she told the girl. The man told K. not to tell anybody. The man did not tell K. his name, but he was going to swim with them. She did not remember what he looked like. Eventually, K. said the man "licked [her] bum" with his tongue. She was wearing panties, but he took them all the way off. When he licked her, she was lying down on a towel.[5] He put her panties back on her. After he licked K., he went into the shower to hide. His mom saw him in the bathroom. She was happy. K. told the secret to his mom. During the interview, K. marked the buttock area of a diagram as being her "bum."

After K. was interviewed, a sexual assault examination was performed on her. That same day, blood was drawn from defendant for purposes of obtaining DNA. Subsequent analysis revealed male DNA on the anal swab taken from K. Due to the large amount of female DNA that was also present, testing was done on the Y chromosome (male component) of the DNA. Defendant and his male blood relatives could not be eliminated as possible contributors of the DNA on the anal swab.

After K. was interviewed, Y. told her four oldest children that the man who had been staying with them—defendant—had touched K. inappropriately. S. asked what that meant. Y. explained that defendant touched K.'s private parts. S. said he did that to her, too, and took pictures of her in her panties. Y. immediately contacted Detective Peters.

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[4]A video recording of the interview was played for the jury. At trial, K. (who was six years old by then) did not remember living in California. She remembered defendant, but did not recall anything happening with him. She remembered talking with police officers. She told them the truth.

[5]A towel matching the description K. gave was found in the downstairs bathroom at the house.

Dower conducted a forensic interview with S. on August 20.[6] S. said there was a boy who took pictures of her. She did not know his name, but he used to throw her and he had to go to jail because he was doing things to her that were not good. He took pictures of her private part more than once. The first time was in the toy room. He was on the bed and she was standing right in front of him. S. pulled her shorts down and the man took pictures of her panties with his phone. He asked her to pull down her panties to see her "bum," but she told him no. He said okay and told her to go. The man came and slept over with his wife, T. When they all swam together, the man would pick S. up and throw her in the pool. He picked her up by the stomach and her private part. He touched her with his hand on the outside of her swimsuit, where she "pee[s]." He always threw her like that, even when she told him to throw her using both his hands on her stomach.

Detective Peters subsequently performed a partial data extraction on defendant's cell phone and found 13 deleted photographs of K. The photographs started with her fully clothed, wearing the same outfit she wore in the forensic interview. As the photographs progressed, they showed her lifting up her nightgown and exposing her stomach. They then showed her without panties, then lying on the towel with her legs above her head, exposing her genitalia. The final photograph was a closeup of her genitalia and anus. The photographs were deleted or moved off of the phone, perhaps to a cloud drive, at approximately 3:00 p.m. on August 19. Peters was unable to recover any photographs of S. from the cell phone, or any photographs of defendant with either girl.

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[6] A video recording of the interview was played for the jury. At trial, S. (who was eight years old by then) remembered living in a house with a swimming pool in California. She recalled defendant telling her to pull down her shorts. They were in the "toy room" at the time. She obeyed. He then told her to pull down her underwear, but she said no. Defendant took a picture of her underwear with his phone. At some point, S. went swimming with defendant. She believed her siblings and possibly her father were also in the pool. Defendant picked up S. and threw her in the pool. When he picked her up, he touched her genital area. He did this more than once.

DISCUSSION

I. Denial of Request for Self-representation

Defendant contends he is entitled to a reversal because of the erroneous denial of his July 21, 2016, motion to represent himself. (*Faretta v. California* (1975) 422 U.S. 806 (*Faretta*).) We conclude the motion was properly denied.

A. Background

Defendant was arraigned on the complaint, and counsel was appointed, on August 22, 2014. The preliminary hearing was tentatively set for September 5, 2014, but that date subsequently was vacated. The matter was continued several times, mostly at defense request, with a new tentative preliminary hearing date eventually set for May 21, 2015. On May 13, 2015, defendant requested a new attorney. (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).) In a letter to the court, defendant stated he would like to "go pro per," but was unable to do so due to a speech impediment. At the hearing, defendant confirmed he was not requesting to represent himself. The *Marsden* request was denied.

The preliminary hearing was held on June 9, 2015. Defendant was arraigned on the information on June 24, 2015. A suppression hearing was set for August 19, 2015. On that date, a defense request for a continuance to permit the exchange of discovery was granted, and the suppression hearing was taken off calendar. After further continuances, a tentative trial date of December 7, 2015, was vacated, and a new trial date of February 25, 2016, was set. On February 23, 2016, defense counsel filed a suppression motion. On February 25, 2016, a settlement conference and motions date was set for April 7, 2016, and trial was tentatively set for April 28, 2016. On April 7, 2016, the matter was continued, at defense request, to permit review of discovery. The settlement conference was reset for May 12, 2016, with trial tentatively set for May 23, 2016. On May 12, 2016, the suppression motion was set for hearing on May 19, 2016. On May 19, 2016, the matter was continued at defense request. The settlement conference and

suppression hearing were set for July 7, 2016, and trial was tentatively set for July 14, 2016. On July 7, 2016, the matter again was continued at defense request, with the settlement conference and suppression motion set for July 21, 2016, and trial tentatively set for August 1, 2016.

On July 21, 2016, the parties appeared before Judge Ellison. That morning, defendant presented defense counsel with a written motion to act as his own attorney, and Judge Ellison had defendant fill out and initial an "ADVISEMENT AND WAIVER OF RIGHT TO COUNSEL" form. Asked by Judge Ellison whether, if his request was granted, he was prepared to go ahead with the suppression hearing that was scheduled for that morning, defendant responded, "I would at least need to look over this motion because I would need to research it myself and find out whether I believe that the motion is viable." Thus, he would be asking the court to delay the hearing.[7] Defendant also stated he was not ready to go forward with trial on August 1, as set. Asked if he had any idea when he could be ready, defendant responded, "Um, I can't say for sure, having never been through this before." The People stated they would oppose any request for a continuance, whether made by defense counsel or defendant representing himself. The prosecutor noted this was a 2014 case that had been set for trial several different times, and travel arrangements had been made for witnesses coming from Washington and Idaho. The prosecutor stated the People had been patient, but were ready to proceed and felt defendant's request was a delay tactic. Defendant stated he did not have any witnesses under subpoena for trial. At one point, after Judge Ellison mentioned the various things defendant would have to learn by August 1 or a date shortly after if a continuance was granted, defendant remarked, "I hope—hopefully it will not be too short."

[7]The People were ready to proceed and had their witnesses, who were law enforcement officers, on call.

Judge Ellison observed that he generally would be required to permit defendant to represent himself, but "[t]hat's not necessarily the case when you are on the virtual eve of trial, and we are within two weeks of this trial date. You don't have an unrestricted right in those circumstances, and I consider this to be virtually on the eve of trial given what you are telling me about the nature of this case and your need for what sounds like substantial time." He then asked defendant why defendant was making his request. Defendant first said he did not believe his reasons were part of the *Faretta* motion, then responded that he did not believe defense counsel was representing him "to the best quality that can be done." Defendant said he did not believe a lot of the things counsel was telling him, and he wanted to research them for himself.

Judge Ellison then held a *Marsden* hearing. Defendant stated he still preferred to "go pro per," but then explained why he felt he could not trust defense counsel's assessment of things and how he felt ignored whenever he brought something up. Defendant stated he was no "newby to having to research stuff," and that when he could not get the information himself and could not trust the people around him, he did not handle things well. That was why he wanted to represent himself, because it was the only way he could get the information himself that he needed. After hearing from defense counsel, Judge Ellison found nothing to suggest counsel was acting incompetently, and denied the *Marsden* motion.

Back in open court, defendant again confirmed he wanted to represent himself and would need a continuance but did not know how long it would take him to get ready. Judge Ellison found his request untimely, as trial had been continued on several occasions over a period of approximately two years, yet defendant did not ask to represent himself until within days of the trial date and essentially was demanding a continuance of trial. After reviewing pertinent factors set out by the California Supreme Court, Judge Ellison stated:

> "This Court concludes that you are not entitled to represent yourself under these circumstances for the following reasons: First of all your request is clearly gonna demand a continuance of this case, and the People, I think, have asserted what is clear prejudice. This is not only a case which has been continued for a couple of years, and that the People are ready to proceed now with witnesses from out of town, this is a case in which at least one or more of the witnesses are minors, children, whose recollection of events is already going to be negatively affected by the delay and the presentation of evidence in this case, and so the People are clearly gonna be prejudiced by the request. I think as important as any of that, is your reasons for wanting to do this are completely consistent with [the prosecutor's] argument here that the only reason you are doing this is to just delay this. There is no other good reason you've presented to the Court. You have alleged your dissatisfaction with [defense counsel's] representation, but it's the Court's view that he has acted competently in representing you; a factor the Court is required to consider, the quality of representation …. There has not been a substitution of counsel previously, but you at least made requests to do that previously. And the length of the proceedings in this case I suppose has to do with just how long it's been continued. In balance it is the Court's view that there is really no good cause for a granting of a pro per request at this late date in light of the circumstances, and there's gonna be a clear prejudice."

Judge Ellison found defendant was attempting to use his *Faretta* rights as a means of unjustifiably delaying trial, and concluded: "A request for continuance to prepare for a trial without some showing of reasonable cause for the lateness of the request, and really no prospect of when this trial might ever take place given your request to research the subject under the circumstances the Court finds that that request is untimely and I'm denying your request." Judge Ellison further stated, however, that he was making that decision based on the fact the case was set for trial on August 1, and the People were objecting to a continuance. If the trial was continued for some other reason, defendant could remake his request.

On July 28, 2016, the parties appeared before Judge Oppliger for a settlement conference. Defendant stated he did not recognize defense counsel as his attorney. Judge Oppliger declined to hear what he termed a motion for reconsideration of Judge Ellison's ruling, finding himself without jurisdiction to do so. Through defense counsel, defendant

then requested a continuance of trial to explore the calling of a witness. Judge Oppliger denied the motion as being oral and untimely, and confirmed the matter for trial.

On July 29, 2016, defense counsel filed a written motion to continue trial on the grounds defendant wanted the opportunity to subpoena a main witness and to represent himself.[8] The motion was heard by Judge Gaab on August 1, 2016. The prosecutor represented that the People would make G.T. available, should the trial court allow her testimony. Defense counsel stated he would submit the matter in terms of the witness, but that defendant was "strenuously requesting to proceed pro per." Judge Gaab ruled the *Faretta* motion could be renewed before the trial judge, but denied the motion for a continuance and assigned the matter for trial.

The trial court confirmed with defendant that if defendant was allowed to proceed as his own attorney, he would not be prepared to start trial that day. Defendant stated he believed there was investigative work that needed to be done; specifically, he wanted to look into matters regarding the DNA evidence himself, along with the evidence found on his phone. The court noted the issues had been raised before and addressed by other judges, and so it would be untimely to allow defendant to represent himself if he was not prepared to proceed to trial at that time. Defendant claimed his lawyer had previously told him that setting dates for trial was a formality, and that further investigative work was going to be done. Defendant was "thrown off" to learn, on July 21, that trial was definitely set for August 1. He stated he was still receiving discovery as recently as the day before and was confused as to how he could be ready to go to trial when he was still receiving discovery. The trial court denied the *Faretta* request as untimely.

[8]The witness was G.T., the exclusion of whose anticipated testimony we will discuss, *post*.

B. Analysis[9]

As articulated in *Faretta* and its progeny, "'[a] criminal defendant has a right to represent himself at trial under the Sixth Amendment to the United States Constitution. [Citations.] A trial court must grant a defendant's request for self-representation if three conditions are met. First, the defendant must be mentally competent, and must make his request knowingly and intelligently, having been apprised of the dangers of self-representation. [Citations.] Second, he must make his request unequivocally. [Citations.] Third, he must make his request within a reasonable time before trial. [Citations.]'" (*People v. Stanley* (2006) 39 Cal.4th 913, 931–932.) "When 'a motion to proceed *pro se* is timely imposed, a trial court must permit a defendant to represent himself upon ascertaining that he has voluntarily and intelligently elected to do so, irrespective of how unwise such a choice might appear to be. Furthermore, the defendant's "technical legal knowledge" is irrelevant to the court's assessment of the defendant's knowing exercise of the right to defend himself.' [Citation.] Erroneous denial of a *Faretta* motion is reversible per se. [Citation.]" (*People v. Dent* (2003) 30 Cal.4th 213, 217.)

In the present case, defendant's request to represent himself was unequivocal, and no question was raised concerning his mental competence or whether he was making his request knowingly and intelligently. The question is whether his request was timely, i.e., whether it was made "within a reasonable time prior to the commencement of trial." (*People v. Windham* (1977) 19 Cal.3d 121, 128.) Timeliness is required as a means of preventing a defendant from misusing the motion to delay the trial unjustifiably or to obstruct the orderly administration of justice. (*People v. Mayfield* (1997) 14 Cal.4th 668, 809, disapproved on another ground in *People v. Scott* (2015) 61 Cal.4th 363, 390, fn. 2;

[9]Insofar as we can tell, defendant is challenging only Judge Ellison's denial of the July 21, 2016, motion. Our analysis and conclusion would be the same with respect to the subsequent *Faretta* requests and rulings.

People v. Windham, *supra*, at p. 128, fn. 5.) Only when the right of self-representation is asserted in a timely manner is that right absolute (*People v. Mayfield*, *supra*, at p. 809); when the motion is untimely, "'self-representation is no longer a matter of right but is subject to the trial court's discretion.' [Citation.]" (*People v. Boyce* (2014) 59 Cal.4th 672, 702.)

Neither the United States nor the California Supreme Court has set a definitive time before trial at which a *Faretta* motion is considered untimely, or articulated factors to be considered in determining whether the motion was made a reasonable time before trial. (*People v. Lynch* (2010) 50 Cal.4th 693, 722 (*Lynch*), disapproved on another ground in *People v. McKinnon* (2011) 52 Cal.4th 610, 637–638.) The California Supreme Court has held that *Faretta* motions made "on the eve" of trial are untimely, while motions made "long before" trial are timely. (*Lynch*, *supra*, at pp. 722–723.) The state high court has explained that "timeliness for purposes of *Faretta* is based not on a fixed and arbitrary point in time, but upon consideration of the totality of the circumstances that exist in the case at the time the self-representation motion is made." (*Id*. at p. 724; see *People v. White* (1992) 9 Cal.App.4th 1062, 1072.) Accordingly, "a trial court may consider the totality of the circumstances in determining whether a defendant's pretrial motion for self-representation is timely. Thus, a trial court properly considers not only the time between the motion and the scheduled trial date, but also such factors as whether trial counsel is ready to proceed to trial, the number of witnesses and the reluctance of availability of crucial trial witnesses, the complexity of the case, any ongoing pretrial proceedings, and whether the defendant had earlier opportunities to assert his right of self-representation." (*Lynch*, *supra*, at p. 726.)

We conclude Judge Ellison properly found defendant's request to be untimely. Although the request was made some 11 days before the scheduled trial date, it was made the morning of a hearing on a defense suppression motion that had been filed months earlier, and for which the prosecutor had witnesses on call. With respect to the trial itself,

travel arrangements had already been made for out-of-state witnesses, all of whom were crucial to the People's case. Moreover, two of the witnesses—the alleged victims—were young children, for whom any delay could be detrimental in terms of their memories of events. (See *Lynch*, *supra*, 50 Cal.4th at p. 727 [taking into account fact that case involved crucial witnesses and victims who were elderly].) Defendant had numerous earlier opportunities to assert his right of self-representation but did not do so, and at one point even disavowed the notion he was seeking to represent himself. Even assuming the delay in bringing this case to trial cannot be attributed to defendant, "he did not thereby escape any responsibility for timely invoking his right to self-representation." (*Ibid*.) Moreover, defendant did not dispute he would need a continuance to investigate and prepare, but he was unable to give Judge Ellison any estimate of when he could be ready. "A trial court may properly consider the delay inherently caused by such uncertainty in evaluating timeliness. [Citations.]" (*Id*. at p. 728.)

Because defendant's motion was untimely under the circumstances of the case, defendant was not entitled to self-representation as a matter of right, but rather subject to Judge Ellison's discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 959.) "In exercising this discretion, the trial court should consider factors such as '"the quality of counsel's representation of the defendant, the defendant's prior proclivity to substitute counsel, the reasons for the request, the length and stage of the proceedings, and the disruption or delay which might reasonably be expected to follow the granting of such a motion."' [Citation.]" (*Ibid*.; accord, *People v. Clark* (1992) 3 Cal.4th 41, 98–99, overruled on another ground in *People v. Pearson* (2013) 56 Cal.4th 393, 462; *People v. Burton* (1989) 48 Cal.3d 843, 853; *People v. Windham*, *supra*, 19 Cal.3d at p. 128.) "[D]iscretion is abused whenever the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]" (*People v. Giminez* (1975) 14 Cal.3d 68, 72.)

A review of the foregoing factors convinces us Judge Ellison did not abuse his discretion in denying defendant's untimely *Faretta* motion, particularly in light of defendant's failure to seek self-representation during the approximately two years the case had been pending, and the disruption and delay to the proceedings, of an indeterminable length, that would have resulted had the motion been granted. (See *Lynch*, *supra*, 50 Cal.4th at p. 728; *People v. Clark*, *supra*, 3 Cal.4th at pp. 100–101; *People v. Burton*, *supra*, 48 Cal.3d at p. 854; *People v. Ruiz* (1983) 142 Cal.App.3d 780, 791–792.)

Rather than address any California authorities concerning the issue of timeliness, defendant relies on a line of federal decisions from the Ninth Circuit Court of Appeals that hold a *Faretta* request is timely even if made on the day of trial. (E.g., *United States v. Smith* (9th Cir. 1986) 780 F.2d 810, 811; *Armant v. Marquez* (9th Cir. 1985) 772 F.2d 552, 555; *Fritz v. Spalding* (9th Cir. 1982) 682 F.2d 782, 784.) As defendant recognizes, however, "we are not bound by decisions of the lower federal courts, even on federal questions. [Citations.]" (*People v. Crittenden* (1994) 9 Cal.4th 83, 120, fn. 3.)

Moreover, these cases do not assist defendant because they permit a court to deny a *Faretta* request where the purpose thereof is to secure delay. (*People v. Moore* (1988) 47 Cal.3d 63, 80–81; *United States v. Smith*, *supra*, 780 F.2d at pp. 811–812; *Fritz v. Spalding*, *supra*, 682 F.2d at p. 784–785.) As the California Supreme Court has explained:

> "The federal rule, though it calls motions timely until the jury is impaneled, may in practice differ little from our own rule. It is within the court's discretion to deny a motion made before the jury is impaneled if the court finds the motion is made for the purpose of delay. [Citation.] The fact that the granting of the motion will cause a continuance, and that this will prejudice the People, may be evidence of the defendant's dilatory intent. Similarly, the defendant's pretrial delays, in conjunction with a motion for continuance for the purpose of self-representation, would be strong evidence of a purpose to delay. [Citations.] In most of the [federal] cases finding a motion timely as a matter of law, no continuance would have been

> necessary. [Citations.] In the instant case, although the motion would be termed timely under the federal rule, the trial court would still have discretion to deny the motion if it considered it entered for the purpose of delay. This differs little as a practical matter from the standard we set out in [*People v.*] *Windham*, *supra*, 19 Cal.3d 121, except that we place the burden on the defendant to explain his delay when he makes the motion as late as defendant did here. To the extent that there is a difference between the federal rule and the California rules, we find the federal rule too rigid in circumscribing the discretion of the trial court and adhere to the California rule. [Citation.]" (*People v. Burton*, *supra*, 48 Cal.3d at p. 854.)

Judge Ellison's finding of a dilatory purpose is supported by the record. Defendant's motion was properly denied.

II. Evidentiary Issues

A. Exclusion of Impeachment Evidence

Defendant contends the trial court committed federal constitutional error by excluding purportedly crucial evidence that would have impeached S.'s account of the swimming pool incident. We conclude the trial court's ruling fell well within its discretion.

1. Background

Prior to trial, the People asked the court to conduct an Evidence Code[10] section 402 hearing on the issue of whether G.T. should be allowed to testify for the defense, as the People believed her testimony was irrelevant. At the hearing on in limine motions, the trial court stated the admissibility issue had been discussed in chambers and that its understanding was the defense wanted to call G.T. for the purpose of showing defendant played with G.T. in the pool and did not molest her or otherwise act inappropriately with her; hence, defendant was not prone to molesting anyone. Defense counsel confirmed that was the purpose of calling G.T. The court found this was "basically taking propensity evidence and standing it on its head," and that the issue for the jury was whether defendant had contact with and molested K. and S., not whether he had contact

[10]Further statutory references are to the Evidence Code unless otherwise stated.

with an additional person whom he did not molest. Accordingly, it ruled the testimony would not be allowed.

Defense counsel represented defendant was adamant that since G.T. was in the pool, she could provide evidence contrary to what the People were alleging with respect to S. This ensued:

> "THE COURT: Well I need a little more detail than that, because the only prof[f]er that I have is that she would testify she was in the pool with other children and the defendant playing. The defendant, apparently, was tossing her in the pool as well, but used his hand on her stomach to throw her and that there was no inappropriate touching.
>
> "[DEFENSE COUNSEL]: That is correct.
>
> "THE COURT: So that all goes to the lack of propensity, is I guess the way I'll phrase it. What other type of evidence are your proffering that she would introduce?
>
> "[DEFENSE COUNSEL]: That she was in the pool the entire time that he was in the pool with the other children.
>
> "THE COURT: Is everybody in agreement that there is only one time that all of this occurred in the pool, that it couldn't [*sic*] been during different times? Or that a then four and six year old child would have been aware of what is being done with someone else?
>
> "[DEFENSE COUNSEL]: No, Your Honor.
>
> "[PROSECUTOR]: No.
>
> "THE COURT: Court's ruling stands."

At trial, S. testified that when defendant would pick her up and throw her in the pool, he would touch her genital area with his hand. She also related this to Caroline Dower during the forensic interview. Also during the forensic interview, S. named various people who were in the pool when this was happening. One of the people she named was her friend G.T. S. told Dower that defendant was throwing G.T. in the pool, but he was touching G.T.'s hips and not her "private part." When Dower asked how S.

knew defendant did not touch G.T.'s "private part," S. responded that she saw defendant with his hands on G.T.'s hips. She did not see his hands anywhere else on G.T.

2. Analysis

"'Relevant evidence' means evidence, including evidence relevant to the credibility of a witness …, having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (§ 210.) "A trial court has broad discretion in determining relevancy, but it cannot admit evidence that is irrelevant or inadmissible under constitutional or state law. [Citation.] 'The proponent of proffered testimony has the burden of establishing its relevance …. [Citations.] Evidence is properly excluded when the proponent fails to make an adequate offer of proof regarding the relevance or admissibility of the evidence. [Citations.]'" (*People v. Blacksher* (2011) 52 Cal.4th 769, 819–820.)

In determining the credibility of a witness, the jury may consider, among other things, "[t]he existence or nonexistence of any fact testified to by him." (§ 780, subd. (i).) Had defense counsel's offer of proof been that G.T. observed defendant's interactions with S. in the swimming pool and did not see defendant touch S. inappropriately, we would have no trouble concluding the proposed testimony was relevant. That was not the offer of proof, however. Rather, the offer of proof was that G.T. would testify defendant was also playing with G.T. in the pool and did not touch G.T. inappropriately; therefore, he was not someone who was prone to molesting anyone.

In *People v. McAlpin* (1991) 53 Cal.3d 1289, 1309–1310 and footnote 14, the California Supreme Court held the trial court should have permitted, under section 1102, character witnesses to testify that they observed the defendant's behavior with their children throughout the course of the witnesses' relationships with the defendant, and that, in their opinion, the defendant was not a person given to lewd conduct with children. The high court distinguished the proffered testimony from testimony intended to prove

the relevant character trait by specific acts of nonmolestation, which would have been properly excluded.

In light of the purpose for which the defense proffered G.T.'s testimony, that testimony appears to have been inadmissible under section 1102. Although that statute was not invoked, at least in the reported portion of the discussion, we review the trial court's ruling, not its reasoning, and affirm if the ruling was correct on any ground. (*People v. Brooks* (2017) 3 Cal.5th 1, 39.)

Assuming the proffered testimony was not made inadmissible by section 1102, the trial court nevertheless did not abuse its discretion by excluding it. At most, the evidence was of only marginal relevance. "'Exclusion of evidence as more prejudicial, confusing or distracting than probative, under … section 352, is reviewed for abuse of discretion.' [Citation.] But 'exclusion of evidence that produces only speculative inferences is not an abuse of discretion.' [Citation.]" (*People v. Cornwell* (2005) 37 Cal.4th 50, 81, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; see *People v. Riccardi* (2012) 54 Cal.4th 758, 809–810, overruled on another ground in *People v. Rangel* (2016) 62 Cal.4th 1192, 1216.)

Defendant asserts the excluded evidence was highly relevant, crucial, and exculpatory with respect to the Penal Code section 288, subdivision (a) charge involving S. The record does not provide support for this claim. Section 352 "must yield to a defendant's due process right to a fair trial and to the right to present all relevant evidence of *significant* probative value to his or her defense. [Citation.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 999.) G.T.'s proffered testimony did not have significant probative value to the defense, and "excluding defense evidence on a minor or subsidiary point does not impair an accused's due process right to present a defense. [Citation.]"

(*People v. Fudge* (1994) 7 Cal.4th 1075, 1102–1103; see *Holmes v. South Carolina* (2006) 547 U.S. 319, 326–327.)[11]

B. Admission of Child Pornography Evidence

Defendant contends the trial court abused its discretion, under section 352, by admitting evidence of the child pornography found on or associated with his laptop computer. He points out that no images of K. or S. were found on the laptop, and says the evidence was irrelevant, unduly inflammatory, and unfairly prejudicial. We find no abuse of discretion.

1. Background

Defendant moved, in limine, to exclude any evidence seized from or discovered on his laptop computer (specifically, any child pornography) as irrelevant and pursuant to section 352. At the hearing, the court stated its understanding, based on discussions in chambers, that the People sought to introduce the existence of child pornography involving victims of approximately the same age as S. and K., and by way of descriptions and not the actual photographs, pursuant to section 1108. The prosecutor confirmed the court's understanding was correct. Defense counsel argued that, under section 352, the evidence would be more prejudicial than probative. The trial court confirmed there would be evidence defendant took pornographic photographs of at least one of the alleged victims, then ruled: "So the Court finds that this would otherwise fall within [section] 1108 …, that any prejudice that's flowing from that is because of the probative value, not despite of [*sic*] it. So the Court on [section] 352 does not find probative value is substantially outweighed by any prejudicial impact and would allow that testimony to come in under [section] 1108. And, again, with the understanding that that is not going

[11]For this reason, were we to conclude the trial court erred, we would assess the error under the state law standard of *People v. Watson* (1956) 46 Cal.2d 818, 836 and conclude it was harmless (*People v. McAlpin*, *supra*, 53 Cal.3d at pp. 1311–1312). S. stated, in her forensic interview, that defendant did not touch G.T. inappropriately, and this evidence was before the jury.

to involve explain [*sic*] the photographs to the jury, but simply an officer's testimony as to the nature and number of those photographs."

Lieutenant Fleming's testimony concerning the images found on and deleted from defendant's laptop is summarized in the statement of facts, *ante*. Jurors were instructed, pursuant to CALCRIM No. 1191, on the limited purpose (i.e., propensity) for which such evidence could be used.

2. Analysis

Generally speaking, section 1101 "prohibits the admission of other-crimes evidence for the purpose of showing the defendant's bad character or criminal propensity." (*People v. Catlin* (2001) 26 Cal.4th 81, 145.) Section 1108 is an express exception to that rule. (§ 1101, subd. (a).) Subdivision (a) of section 1108 provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." Section 1108 thus permits evidence of the defendant's commission of "another sexual offense or offenses" to establish the defendant's disposition or propensity to commit sexual offenses and for its bearing on the probability or improbability the defendant has been falsely or mistakenly accused of such an offense. (*People v. Falsetta* (1999) 21 Cal.4th 903, 912; *People v. Medina* (2003) 114 Cal.App.4th 897, 904.)

Defendant implicitly concedes, as he did at trial, that the challenged child pornography evidence falls within the purview of section 1108. Accordingly, we address only whether the evidence should have been excluded under section 352.

Section 352 provides: "The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." Under this statute, "the

trial court enjoys broad discretion in assessing whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. [Citation.] Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]' [Citation.]" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124–1125.)

"Evidence of uncharged offenses 'is so prejudicial that its admission requires extremely careful analysis. [Citations.]'" (*People v. Ewoldt* (1994) 7 Cal.4th 380, 404.) The "prejudice" referred to in section 352 is not the effect relevant albeit damaging evidence may have on a party's case, but rather "'characteriz[es] evidence that uniquely tends to evoke an emotional bias against a party as an individual, while having only slight probative value with regard to the issues. [Citation.]'" (*People v. Scheid* (1997) 16 Cal.4th 1, 19.) As a result, evidence should be excluded as unduly prejudicial "'when it is of such nature as to inflame the emotions of the jury, motivating [jurors] to use the information, not to logically evaluate the point upon which it is relevant, but to reward or punish one side because of the jurors' emotional reaction. In such a circumstance, the evidence is unduly prejudicial because of the substantial likelihood the jury will use it for an illegitimate purpose.' [Citation.]" (*People v. Escudero* (2010) 183 Cal.App.4th 302, 310.)

"The factors to be considered by a trial court in conducting the … section 352 weighing process depend upon 'the unique facts and issues of each case ….' [Citation.]" (*People v. Nguyen* (2010) 184 Cal.App.4th 1096, 1116.) "In exercising [section 352] discretion as to a sexual offense, 'trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on

the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.' [Citation.]" (*People v. Loy* (2011) 52 Cal.4th 46, 61; see *People v. Branch* (2001) 91 Cal.App.4th 274, 282.)

Possession of pornography showing defendant had a sexual interest in young children was highly relevant to issues in dispute at his trial. (See *People v. Reliford* (2003) 29 Cal.4th 1007, 1012; *People v. Snyder* (2016) 1 Cal.App.5th 622, 634.) Contrary to his claim, this conduct was not unduly inflammatory compared to the charged offenses since the actual images were not shown to the jury and were not described in unnecessary detail, and particularly in light of the images of K. that were found on defendant's cell phone. Moreover, the evidence was presented quickly, and the conduct was not remote. (See, e.g., *People v. Merriman* (2014) 60 Cal.4th 1, 80; *People v. Loy*, *supra*, 52 Cal.4th at p. 62; *People v. Wilson* (2008) 44 Cal.4th 758, 797–798; *People v. Snyder*, *supra*, at p. 634.) Although defendant was never punished for the uncharged acts of possession, a fact that can heighten prejudicial effect (see *People v. Ewoldt*, *supra*, 7 Cal.4th at p. 405), this did not render the evidence substantially more prejudicial than probative. Significantly, the evidence "did not encourage the jury to prejudge defendant's case based on extraneous or irrelevant considerations" (*People v. Rogers* (2006) 39 Cal.4th 826, 853), and jurors were instructed, pursuant to CALCRIM No. 1191, as to the purpose for which they could consider the evidence, and that the evidence was not sufficient by itself to prove defendant was guilty of the charged offenses.

The trial court acted well within its discretion in admitting the challenged evidence. Since the evidence was admitted for a permissible purpose and its exclusion was not compelled by section 352, defendant's due process rights were not violated.

(*People v. Foster* (2010) 50 Cal.4th 1301, 1335; *People v. Albarran* (2007) 149 Cal.App.4th 214, 229–230.)

C. Admission of K.'s Forensic Interview

Defendant contends K.'s forensic interview, a video recording of which was admitted into evidence and played for the jury, should have been excluded as insufficiently reliable. We conclude the issue has not been preserved for appeal, and defendant has failed to establish ineffective assistance of counsel.

1. Background

The People moved, in limine, to admit K.'s and S.'s forensic interviews into evidence pursuant to section 1360. In part, the People contended the circumstances of each established sufficient indicia of reliability for admissibility under that section. Defendant's pertinent motion in limine read:

> "**MOTION 4:** INTRODUCTION OF MDIC [forensic] INTERVIEWS AND OTHER STATEMENTS OF K[.] AND S[.] WHOM [*sic*] WERE MINORS UNDER THE AGE OF 12. Evidence Code section 1360 should be deemed a violation of the Confrontation Clause of the United States Constitution. In the alternative, this court should strictly adhere to the court ruling in People v. Brodit (1998) 61 Cal.App.4th 1312, which states in determining the reliability of the child's statement, courts should consider (1) spontaneity and consistent repetition; (2) the mental state of the declarant; (3) the use of the terminology unexpected of a child of similar age; (4) lack of motive to fabricate; (5) competence to testify at trial, in allowing hearsay statements."

During the hearing on the motion, the court stated its understanding that the basis for the defense request to exclude the statements was the right to confrontation. Defense counsel agreed. The court then confirmed with the prosecutor that she intended to call both girls as percipient witnesses, and they would be available for cross-examination. The court asked defense counsel: "So based on that representation, is there any ground, other than confrontation, for not bringing those in?" Defense counsel responded, "No, Your Honor." The trial court then denied the defense motion to exclude the interviews.

2. Analysis

Section 1360 provides in pertinent part: "(a) In a criminal prosecution where the victim is a minor, a statement made by the victim when under the age of 12 describing any act of child abuse … performed with or on the child by another, … is not made inadmissible by the hearsay rule if all of the following apply: [¶] (1) The statement is not otherwise admissible by statute or court rule. [¶] (2) The court finds, in a hearing conducted outside the presence of the jury, that the time, content, and circumstances of the statement provide sufficient indicia of reliability. [¶] (3) The child … : [¶] (A) Testifies at the proceedings."[12]

Here, defendant originally objected on confrontation grounds. His written motion was unclear with respect to whether he was also challenging K.'s statements in the forensic interview as unreliable. If he was, defense counsel then abandoned that portion of his objection—or, at the very least, failed to secure a ruling thereon—when questioned by the trial court. As a result, the claim of error has not been preserved for appeal.

"A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous admission of evidence unless: [¶] (a) There appears of record an objection to or a motion to exclude or to strike the evidence that was timely made and so stated as to make clear the specific ground of the objection or motion …." (§ 353.)

> "'[T]he objection must be made in such a way as to alert the trial court to the nature of the anticipated evidence and the basis on which exclusion is sought, and to afford the People an opportunity to establish its admissibility.' [Citation.] What is important is that the objection fairly inform the trial court, as well as the party offering the evidence, of the specific reason or reasons the objecting party believes the evidence should be excluded, so the party offering the evidence can respond appropriately

[12]Because K. testified at trial, defendant's confrontation rights were not implicated by application of the statute. (See *Crawford v. Washington* (2004) 541 U.S. 36, 59, fn. 9 (*Crawford*); *People v. Morrison* (2004) 34 Cal.4th 698, 720; see also *People v. Sisavath* (2004) 118 Cal.App.4th 1396, 1402.)

> and the court can make a fully informed ruling." (*People v. Partida* (2005) 37 Cal.4th 428, 435.)

Defense counsel's response that there was no ground other than confrontation on which to exclude K.'s forensic interview forfeited the reliability claim for purposes of appeal. (See, e.g., *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 371; *People v. Solomon* (2010) 49 Cal.4th 792, 821.) Defendant insists, despite the Attorney General's citation of California Supreme Court authority directly to the contrary, that we have discretion to reach the issue anyway. In actuality, section 353 bars us from directly addressing the issue. (*People v. Williams* (1998) 17 Cal.4th 148, 161, fn. 6.) We can do so only through defendant's alternative claim of ineffective assistance of counsel.

The burden of proving ineffective assistance of counsel is on the defendant. (*People v. Pope* (1979) 23 Cal.3d 412, 425.)

> "To secure reversal of a conviction upon the ground of ineffective assistance of counsel under either the state or federal Constitution, a defendant must establish (1) that defense counsel's performance fell below an objective standard of reasonableness, i.e., that counsel's performance did not meet the standard to be expected of a reasonably competent attorney, and (2) that there is a reasonable probability that defendant would have obtained a more favorable result absent counsel's shortcomings. [Citations.] 'A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Cunningham, supra*, 25 Cal.4th at p. 1003; see generally *Strickland v. Washington* (1984) 466 U.S. 668, 687–694.)

Defendant fails to bear his burden of demonstrating counsel's performance was deficient in that he fails to establish an objection on reliability grounds would have been meritorious. (See *People v. Carter* (2003) 30 Cal.4th 1166, 1210.) "We review a trial court's admission of evidence under section 1360 for abuse of discretion. [Citation.]" (*People v. Roberto V.* (2001) 93 Cal.App.4th 1350, 1367; see *People v. Waidla* (2000) 22 Cal.4th 690, 724.) A trial court has "broad discretion" in determining whether a party has

established the foundational requirements for application of a hearsay exception. (*People v. Martinez* (2000) 22 Cal.4th 106, 120.)[13]

The California Supreme Court has identified the following nonexhaustive list of factors as being relevant to the reliability of hearsay statements made by a child witness in a sexual abuse case: (1) spontaneity and consistent repetition; (2) the declarant's mental state; (3) use of terminology unexpected of a child of a similar age; (4) lack of motive to fabricate; and (5) the child's ability to understand the duty to tell the truth and to distinguish between truth and falsity. (*In re Cindy L.* (1997) 17 Cal.4th 15, 29–30; see *Idaho v. Wright* (1990) 497 U.S. 805, 821–822, abrogated in part by *Crawford*, *supra*, 541 U.S. at pp. 60–62; *In re Lucero L.*, *supra*, 22 Cal.4th at p. 1250.)

In our view, these factors all point in favor of admission of K.'s interview. In support of his claim K.'s interview was unreliable, defendant points only to contradictions in K.'s statements during the interview, and to contradictions between those statements and her trial testimony. K.'s trial testimony is not relevant to the issue

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[13]It has been held that a trial court's findings concerning indicia of reliability are subject to independent review on appeal. (*People v. Tatum* (2003) 108 Cal.App.4th 288, 296; *People v. Eccleston* (2001) 89 Cal.App.4th 436, 445–446; but see *People v. Brodit*, *supra*, 61 Cal.App.4th at p. 1330 [applying abuse of discretion standard to trial court's finding hearsay statements were reliable for purposes of § 1360].) The cases so holding cite *Lilly v. Virginia* (1999) 527 U.S. 116, 136 as authority for that proposition. In *Lilly*, however, the United States Supreme Court followed the standard set forth in *Ohio v. Roberts* (1980) 448 U.S. 56, which conditioned the admission of hearsay evidence on whether it fell "within a firmly rooted hearsay exception" or bore "adequate 'indicia of reliability.'" (*Id.* at p. 66; see *Lilly v. Virginia*, *supra*, at pp. 124–125 (plur. opn. of Stevens, J.).) *Roberts* in turn was abrogated by *Crawford*, *supra*, 541 U.S. at pages 60–62, thereby rendering *Lilly* "a dead letter" (*U.S. v. Smalls* (10th Cir. 2010) 605 F.3d 765, 773).

In light of these developments in the law, it appears to us the "reliability" requirement of section 1360, subdivision (a) is now a foundational one subject to the usual abuse of discretion standard of review applicable to state law hearsay exceptions in general. (See *In re Lucero L.* (2000) 22 Cal.4th 1227, 1249–1250 [reviewing court must uphold finding hearsay statements possessed sufficient indicia of reliability if supported by substantial evidence].) We need not make this determination, since our conclusion in the present case would be the same under either standard.

of the reasonableness of counsel's performance with regard to the pretrial motion, however. (See *People v. Scott* (1993) 17 Cal.App.4th 405, 407.) And, in any event, we cannot say the trial court would have excluded—or was required to exclude—the interview, whether in response to a pretrial objection or an objection made at a time K.'s trial testimony rightfully could be considered.

"[T]he reliability of testimonial hearsay is best established by 'the crucible of cross-examination.' [Citation.]" (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 1028, fn. 19, quoting *Crawford*, *supra*, 541 U.S. at p. 61.) Defendant was free to establish, if he could, the unreliability of K.'s statement and testimony. Counsel's failure to do so does not mean his performance was deficient.

Defendant says admission of K.'s interview violated due process. Because he has failed to show the evidence was improperly admitted or rendered his trial fundamentally unfair, his claim fails. (See *People v. Falsetta*, *supra*, 21 Cal.4th at p. 913; *People v. Hunt* (2011) 196 Cal.App.4th 811, 817.)

III. CALCRIM No. 1190

Defendant contends CALCRIM No. 1190 "improperly reduces the burden of proof for sex-offense complainant-witness testimony in violation of Procedural Due Process," because, unlike CALCRIM Nos. 301 and 302, it contains no cautionary admonitions to guide jurors in determining whether to convict based on the testimony of a single witness. He says the differences between CALCRIM No. 1190 on the one hand, and CALCRIM Nos. 301 and 302 on the other hand, suggest the cautionary portions of the latter do not apply to the former, and CALCRIM No. 1190 suggests the testimony of a sex-crime complainant is not subject to the same level of scrutiny as the testimony of other witnesses. Defendant's claim lacks merit.

A. Background

The People requested the jury be instructed, inter alia, with CALCRIM Nos. 301, 302, and 1190. Defense counsel made no objection to, and requested no modification or clarification of, those instructions. Pursuant to CALCRIM No. 301, the trial court subsequently told jurors: "The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence." This was immediately followed by CALCRIM No. 302, to wit: "If you determine there is a conflict in the evidence, you must decide what evidence if any to believe. Do not simply count the number of witnesses who agree or disagree on a point and accept the testimony of the greater number of witnesses. On the other hand, do not disregard the testimony of any witness without a reason or because of prejudice or a desire to favor one side or the other. What is important is whether the testimony or any other evidence convinces you, not just the number of witnesses who testify about a certain point." Later, following instructions setting out the elements of the sexual assault charges, the court instructed, pursuant to CALCRIM No. 1190: "Conviction of a sexual assault crime may be based on the testimony of the complaining witness alone."

B. Analysis

"[F]ailure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal [citations]." (*People v. Lee* (2011) 51 Cal.4th 620, 638.) CALCRIM Nos. 301, 302, and 1190 all correctly state the law. (See *People v. Gammage* (1992) 2 Cal.4th 693, 700 (*Gammage*) [discussing CALJIC No. 2.27, CALCRIM No. 301's counterpart, and CALJIC No. 10.60, CALCRIM No. 1190's counterpart]; *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 884–885 [discussing CALJIC No. 2.22, CALCRIM No. 302's counterpart]; § 411 [except where additional evidence required by statute, direct evidence of one witness entitled to full credibility is sufficient for proof of any fact].) Accordingly, defendant's failure to object to, or seek

clarification of, the instructions forfeited his claim of error on appeal. His claim also fails on the merits.[14]

In *Gammage, supra,* 2 Cal.4th 693, the trial court instructed, pursuant to CALJIC No. 2.27: "'Testimony as to any particular fact which you believe given by one witness is sufficient for the proof of that fact. However, before finding any fact required to be established by the prosecution to be proved solely by the testimony of such a single witness, you should carefully review all the testimony upon which the proof of such fact depends.' [Citations.]" (*Gammage*, *supra*, at p. 696, italics & fn. omitted.) The trial court also instructed, pursuant to CALJIC No. 10.60: "'It is not essential to a conviction of a charge of rape that the testimony of the witness with whom sexual intercourse is alleged to have been committed be corroborated by other evidence.' [Citation.]" (*Gammage, supra,* at pp. 696–697, fn. omitted.)

The California Supreme Court held it was proper to give the two instructions together in sex cases. (*Gammage*, *supra*, 2 Cal.4th at p. 702.) The court stated:

> "Although the two instructions overlap to some extent, each has a different focus. CALJIC No. 2.27 focuses on how the jury should evaluate a fact … proved solely by the testimony of a single witness. It is given with other instructions advising the jury how to engage in the *fact-finding* process. CALJIC No. 10.60, on the other hand, declares a substantive rule of law, that the testimony of the complaining witness need not be corroborated. It is given with other instructions on the legal elements of the charged crimes. [¶] Because of this difference in focus of the instructions, we disagree with defendant … that, in combination, the instructions create a preferential credibility standard for the complaining witness, or somehow suggest that that witness is entitled to a special deference. The one instruction merely suggests careful review when a fact depends on the testimony of one witness. The other tells the jury there is no legal corroboration requirement. Neither eviscerates or modifies the other." (*Id*. at pp. 700–701.)

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[14]Accordingly, his alternative claim—that if the issue was not preserved, defense counsel's performance was deficient—also fails.

Defendant maintains *Gammage* does not address the claim he now raises. Even if this is so, that opinion strongly suggests CALCRIM No. 1190 does not reduce the burden of proof with respect to the testimony of any particular witness. Moreover, we do not view CALCRIM No. 1190—or even that instruction plus CALCRIM Nos. 301 and 302—in isolation. (*People v. Lucas* (2014) 60 Cal.4th 153, 287, disapproved on another ground in *People v. Romero and Self* (2015) 62 Cal.4th 1, 53, fn. 19.) Rather, "[i]n assessing a claim of instructional error or ambiguity, we consider the instructions as a whole to determine whether there is a reasonable likelihood the jury was misled. [Citations.]" (*People v. Tate* (2010) 49 Cal.4th 635, 696.) "Also, '"'we must assume that jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given.' [Citation.]"'" (*People v. Sattiewhite* (2014) 59 Cal.4th 446, 475.)

Jurors here were told to "[p]ay careful attention to all … instructions and consider them together," and to "judge the testimony of each witness by the same standard …." Taking these instructions into account, it is not reasonably likely jurors interpreted CALCRIM No. 1190 in the way defendant now contends.

IV. Cumulative Prejudice and Substantive Due Process

Defendant contends the alleged evidentiary errors denied him his rights to due process and a fundamentally fair trial. By simply adding a paragraph asserting cumulative prejudice where purportedly applicable, defendant's briefing violates California Rules of Court, rule 8.204(a)(1)(B), which requires that each brief state each point under a separate heading or subheading. In any event, "[t]here was little, if any, error to accumulate. Defendant received a fair trial." (*People v. Horning* (2004) 34 Cal.4th 871, 913.)

Defendant also claims all the errors he asserts violated the federal constitutional guarantee of substantive due process. The briefing on this issue, which again is not set out under a separate heading or subheading, simply consists of defendant's bald assertion,

followed by the citation of several cases. There is no discussion of why substantive due process has purportedly been violated, or how the cases cited are applicable to defendant's case. Simply stating a claim does not make it so, and we decline to address the issue further. (See *People v. Wharton* (1991) 53 Cal.3d 522, 563; *People v. Bragg* (2008) 161 Cal.App.4th 1385, 1396–1397.)

DISPOSITION

The judgment is affirmed.

_____
PEÑA, J.

WE CONCUR:

_____
POOCHIGIAN, Acting P.J.

_____
DETJEN, J.